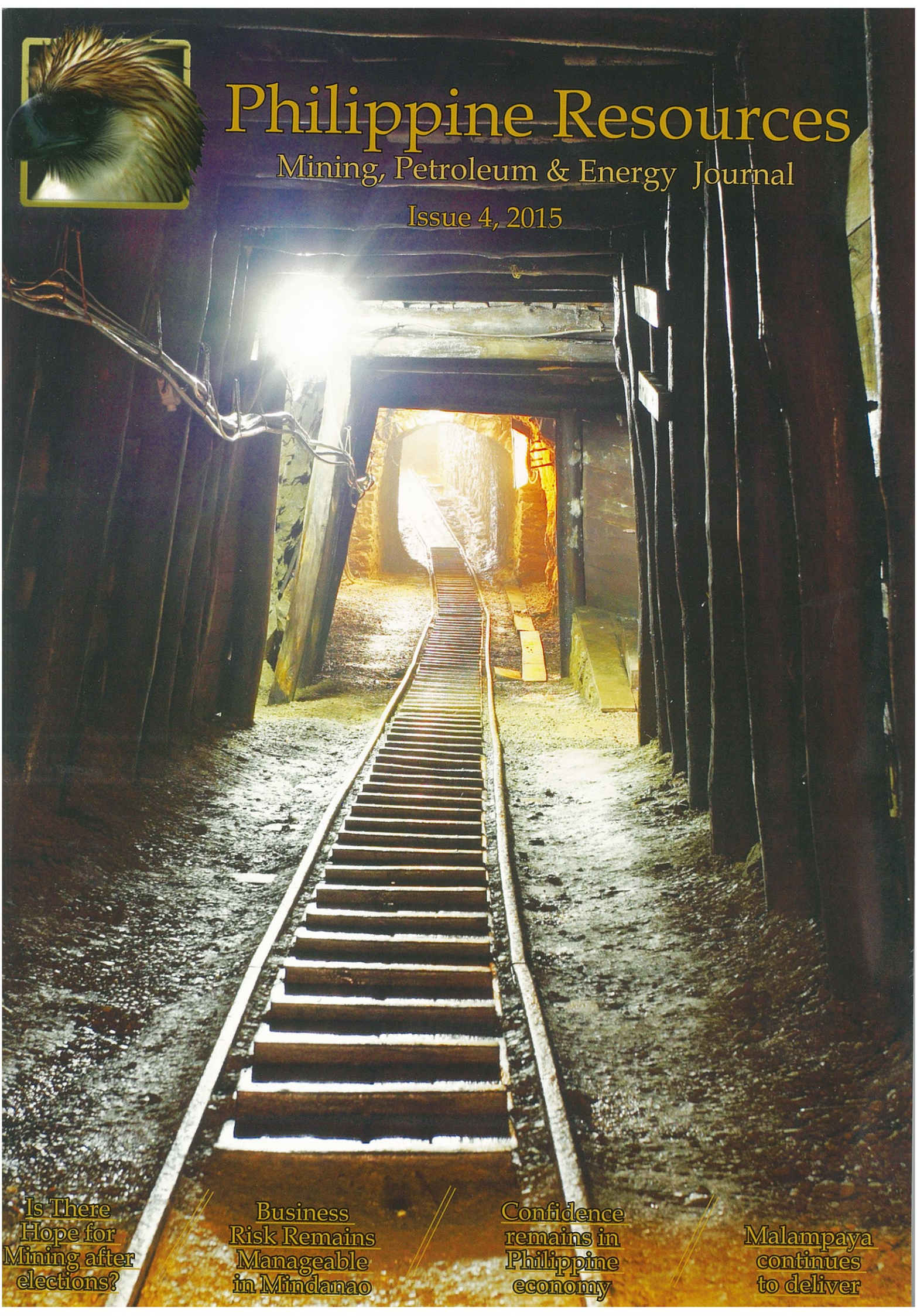

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The Interplay of National and Local Government Power on Control and Supervision of Mineral Resources

By Patricia A. O. Bunye

At the Mining Philippines 2015 Conference, I was tasked to give a presentation on the interplay of national and local government power on the control and supervision of mineral resources. However, due to severe time constraints, my presentation had to be cut short. Thus, with the reader's indulgence, I would like to summarize the salient points of that presentation in this column.

"Interplay" is defined as the way in which two or more things, groups, etc., affect each other when they happen or co-exist. The implies a certain reciprocity. However, from our experience of the relations between the national government and LGUs (LGUs), their relationship is often at odds, especially on the issue of control and supervision of mineral resources.

The respective powers of the National Government and LGUs relating to the control and supervision of mineral resources are based on:

1. the Philippine Constitution
2. Republic Act No. 7942 (Mining Act)
3. Republic Act No. 7160 (Local Government Code or, hereinafter "LGC")

While it is tempting to approach the conflicts between the National Government and LGUs, particularly with respect to the control and supervision of mineral resources from a purely practical perspective, these can only be resolved by examining their basis, i.e. the Constitution, and the applicable laws and jurisprudence.

Article II, Section 25 of the Philippine Constitution [under the heading Declaration of Principles and State Policies] provides that the State shall ensure the autonomy of local governments. This is echoed in Article X, which provides that the territorial and political subdivisions (namely the provinces, cities, municipalities, and barangays) shall enjoy local autonomy. Pursuant to this, the LGC was enacted, providing for a more responsive and accountable local government structure instituted through a system of decentralization, and which shall, among others, allocate among the different LGUs their powers, responsibilities, and resources.

This, however, is not without limitations. The 1991 case of League of Provinces vs. DENR was an occasion for the Supreme Court to state that the constitutional guarantee of local autonomy in Article X, Section 2, refers to the "administrative autonomy of LGUs or, cast in more technical language, the decentralization of government authority.

It does not make local governments sovereign within the State." Administrative autonomy may involve devolution of powers, but subject to limitations such as following national policies or standards, and those provided by the Local Government Code, considering that the structuring of local governments and the allocation of powers, responsibilities, and resources among the different LGUs and local officials have been placed by the Constitution in the hands of Congress.

Article XII, Section 2 on National Economy and Patrimony, on the other hand, provides, among others that all lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. It also provides that the exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.

These constitutional provisions are reiterated in Republic Act No. 7942, otherwise known as the Mining Act.

It must be noted that Section 8 of the Mining Act provides that the DENR shall be the primary government agency responsible for the conservation, management, development, and proper use of the State's mineral resources including those in reservations, watershed areas, and lands of the public domain. It also provides that the MGB shall have direct charge in the administration and disposition of mineral lands and mineral resources.

In line with this, the Mining Act specifically identifies the areas open, (Section 18), as well as the areas closed, to Mining Applications (Section 19). In view of this, LGUs cannot enact their own ordinances stating which areas within their jurisdiction are open or closed to mining.

Section 70 of the Mining Act also refers to Sections 26 and 27 of the Local Government Code of 1991, which require national government agencies to maintain ecological balance, and prior consultation with the LGUs, non-governmental and people's organizations and other concerned sectors of the community. These are two of the most important provisions of the Local Government Code vis-à-vis the implementation of mining laws.

It is worth noting that Section 2 (Declaration of Policy) of the Mining Act declares that it is the policy of the State that the territorial and political subdivisions of the State shall enjoy genuine and meaningful local autonomy to enable them to attain their fullest development as self-reliant communities and make them more effective partners in the attainment of national goals.

It also states that, toward this end, the State shall provide for a more responsive and accountable local government structure instituted through a system of decentralization

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whereby LGUs shall be given more powers, authority, responsibilities, and resources.

Further, Section 3(i) [Operative Principles on Decentralization] provides that LGUs shall share with the national government the responsibility in the management and maintenance of ecological balance within their territorial jurisdiction, subject to the provisions of the Local Government Code and national policies.

The aforementioned provisions on local autonomy and shared responsibility give rise to the misperception that local autonomy means that LGUs have untrammeled authority within their jurisdiction. It must be emphasized, however, that these provisions themselves, provide the respective limitations on the powers of LGUs vis-à-vis the national government.

Section 25(A) of the LGC provides that, consistent with the basic policy on local autonomy, the President shall exercise general supervision over LGUs to ensure that their acts are within the scope of their prescribed powers and functions.

In view of the many instances of conflict between the National Government and LGUs, Executive Order 79 was issued in July 2012 ostensibly to institutionalize and implement reforms in the Philippine mining sector. Among others, it addressed local ordinances which were in conflict with the Constitution. Earlier draft versions of EO 79 referred to the primacy of the Constitution over local ordinances, but what was ultimately issued was a watered down version that referred to consistency of local ordinances with the Constitution and national laws/LGU cooperation.

Nevertheless, while a stronger reference to the primacy of the Constitution would have been preferable, it is clear, that, among other things, LGUs, through their local sanggunians, cannot enact ordinances in contravention of the national law.

One practical manifestation of the conflict between the National Government and LGUs is the enactment of bans on mining in certain jurisdictions. One specific case is that of the Province of South Cotabato which enacted a Provincial Environment Code banning open-pit mining, which the proponents of the Tampakan Copper-Gold Project have identified as the only viable method given the nature and geology of the deposit. It is important to note that no case has been filed to assail the said ordinance. In the absence of court ruling striking down the ordinance, the ban stands.

Nevertheless, it must be emphasized that local ordinances cannot prohibit an act not prohibited by law. They cannot prohibit an act merely regulated by law.

There is no ban under any national law against open-pit mining. The Mining Act does not contain any express prohibition on open-pit or surface mining activities. On the other hand, the Mining Act allows open-pit or surface mining, subject to the regulation of the State. The word 'regulate' means and includes the pow to control, to govern and to restrain; and ca not be construed as synonymous with 'su press' or 'prohibit'. [People vs. Esguerra, 81 P 33 (1948)]. Therefore, LGUs cannot lega ban open-pit mining.

In addition to the fact that the national law lows open pit mining, the DENR promulgat rules and regulations pertaining to open-pit surface mining operations:

- Section 167 of DAO 96-40 which pr vides for rehabilitation of all open-pit are during every stage of the mining operation, well as after the termination stage
- Section 190 of DAO 96-40 which impo es a fee upon mine waste produced from m ing operations except when the mine was is utilized as filling materials for surface mi operations
- DAO No. 98-00 (otherwise known the "Mine Safety and Health Standard") whi allows open pit or surface mining activiti subject to certain rules and regulations by t State.

In the leading case of Magtajas vs. Pryce 1994 case, the Supreme Court held that ordinance cannot amend or nullify a statu In subsequent cases, the Supreme Court h consistently ruled in this manner.

The Supreme Court pointed out that in a lo line of decisions, it has been held that to valid, an ordinance must, among others, n contravene the constitution or any statute. may only regulate, but not prohibit, trade. T reasons for this are:

1. Municipal governments are only agents the national government. Local councils e ercise only delegated legislative powers co ferred on them by Congress as the natio lawmaking body. The delegate cannot be sup rior to the principal or exercise powers high than those of the latter.

2. As unequivocally stated by the Suprer Court it is a heresy to suggest that LGUs c undo the acts of Congress, from which th have derived their power in the first place, a negate by mere ordinance the mandate of t statute.

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3. Municipal corporations owe their origin to, and derive their powers and rights wholly from the legislature. It breathes into them the breath of life, without which they cannot exist.

The Supreme Court has also been emphatic that the basic relationship between the national legislature and the LGUs has not been enfeebled by the new provisions in the Constitution strengthening the policy of local autonomy. To quote the Supreme Court: "Without meaning to detract from that policy, we here confirm that Congress retains control of the LGUs although in significantly reduced degree now than under our previous Constitutions. x x x By and large, however, the national legislature is still the principal of the LGUs, which cannot defy its will or modify or violate it."

Similarly, in Lina vs. Paño, 364 SCRA 76 (2001), the Supreme Court ruled that what the national legislature expressly allows by law, a provincial board may not disallow by ordinance or resolution. It stated that "(N)othing in the present constitutional provision enhancing local autonomy dictates a different conclusion."

In Batangas CATV vs. Court of Appeals, 439 SCRA 326 (2004), the Supreme Court reiterated that the basic relationship between the national legislature and the LGUs has not been enfeebled by the new provisions in the Constitution strengthening the policy of local autonomy: "Ours is still a unitary form of government, not a federal state. Being so, any form of autonomy granted to local governments will necessarily be limited and confined within the extent allowed by the central authority. Besides, the principle of local autonomy under the 1987 Constitution simply means "decentralization". It does not make local governments sovereign within the state or an "imperium in imperio".

There is also an existing DOJ opinion, namely Department of Justice Opinion No. 008, Series of 2005 ("DOJ Opinion No. 008, s. 2005"), which clearly provides that local governments may not actually enact ordinances that go against laws duly enacted by Congress such as the Mining Act.

DOJ Opinion No. 008, s. 2006 involved a question on the validity of ordinances and resolutions issued by a number of LGUs imposing a moratorium on large-scale mining activities and the processing of application for mining within their respective areas of jurisdiction. Although the DOJ declined to render an opinion on the validity of the ordinances in question because such declaration involves a judicial question, it nevertheless declared that local legislation is merely a delegated power citing Magtajas vs. Pryce, 234 SCRA 237 (1994).

There is no argument that, among the fun tions devolved to LGUs is enforcement laws on the protection of the environme Under Section 17 (b)(3)(iii) of the LGC, f example, a province shall, pursuant to natio policies and subject to supervision, control a review of the DENR, enforce forestry la limited to community-based forestry projec pollution control law, small-scale mining l and other laws on the protection of the e vironment; and mini-hydroelectric projects f local purposes."

Under Section 468 of the LGC, the San guniang Panlalawigan likewise has the pow to enact ordinances to protect the envir ment and impose appropriate penalties f acts which endanger the environment, such dynamite fishing and other forms of destr tive fishing, illegal logging and smuggling of l smuggling of natural resources products a of endangered species of flora and fauna, sl and burn farming, and such other activit which result in pollution acceleration of e trophication of rivers and lakes, or of ecol cal imbalance.

Again, the exercise by the local governm unit of its police power to enact ordinan is subject to the due process requireme of the Constitution. Since the grant of pol power is merely statutory, local governme cannot enact ordinances that are contrary the laws enacted by Congress, including t Mining Act.

It has been suggested that greater sensiti must be exercised in dealing with LGUs a that a pure application of legal principles wo not be useful. Without disregarding that th relationship is primarily governed by what t Constitution and the applicable national la provide, the National Government and LG do need to interact harmoniously, otherw more projects will be stalled due to so LGUs' insistence on treading their own p in the name of local autonomy even if thi inconsistent with the prevailing law.

Often, the seemingly myopic exercise of l autonomy by some LGUs is a result of th belief that they are not getting a "good de from a project. Therefore, with respect the exploration, development and utilizat of mineral resources within their jurisdict LGUs need to be convinced that the sam

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consistent with their needs and expectations. While a project may tick all the boxes where the law is concerned, social acceptability and the support of the LGU needs to be won.

Project proponents, for example, must address any "disconnect" in expectations and must ensure that their project is consistent with the LGUs' strategic plans for the use and development of their local resources. The proponent may also assist the LGUs in building capability in preparing these stategic plans and making productive use of any information presented in the company's EIA/ECC.

Both the national government and LGUs need to clearly understand the contribution the company is making and how it compares internationally so that both sides can arrive at a win-win proposition.

Meanwhile, the mining industry needs to continue highlighting success stories, otherwise, ghosts of the past, such as the Marcopper incident, will continue to shape negative perceptions.

Diwata Updates

Diwata-Women in Resource Development, Inc. ("Diwata") had the unique opportunity to tour Site Skills Training's Mining Centre of Excellence, which is located at the old Centennial Expo site in Clark, Pampanga. A major feature of the centre is the Underground Mining Immersive Training Environment [the only one of its kind in Asia] which allows personnel from different mining companies to be trained in underground mining in a safe and controlled environment.

Built in partnership with OceanaGold, and supported by industry partners Monark-Cat, Mynesight, Immersive Technologies, Orica, IndoDrill and Minearc, the immersive mine training environment is available for use by companies looking to train project personnel in wide range of trade, operator and safety courses.

Our visit was made possible by Ms. Tata Corpuz of Austrade, who is now the Chair of Diwata's Membership Committee. Certajnly, it was an excellent activity to keep the current members interested and engaged, attract new members, as well as interact with other colleagues from the mining industry, including our guests from UP-NIGS.

Jarrod Belcher, Director of Development Projects, and his colleagues, Brett Mcphee, General Manager, and Chris Pollard, Business Development Executive, led our tour of the facility.

Our visit on September 18 began with the classrooms used by the trainees. The walls of the classrooms had posters made by the trainees to introduce themselves and to express their hopes and dreams, not just for the training but lives and careers. I was particularly struck about how positive and hopeful they all sounded and that these dreams centered on doing their best in order to give their families a better life.

The facility makes it possible for the Philippines to become the training hub of the most highly skilled miners in the world. It is also envi-

sioned that future participants in UP's Mi 101 course will undergo their field visit at site which is more accessible.

Meanwhile, Diwata forges on with its flag projects, including taking our "Reverse Curse" forum on a roadshow to diffe parts of the Philippines.

On 17 November 2015, at the Universit the Philippines Baguio, and on the occasio the PMSEA ANMSEC, Diwata will preser a local audience, particularly local governn officials, business leaders and students, the ings of the McKinsey Global Institute on resource rich jurisdictions can maximize benefits from natural resources, and avoic "curse" of other jurisdictions which faile do this properly.

Consistent with its objective as a platf for discussion of issues on mining, Diwata always tried to go beyond 'speaking to converted' by reaching out to other st holders who need to be presented obje and measurable facts, and not rhetoric, or industry.

Patricia A. O. Bunye is a senio partner at Cruz Marcelo & Tenefrancia and head of its mining and energy practice. She is also President of Diwata-Women in Resource Development, Inc. Questions and comments are welcome a po.bunye@cruzmarcelo.com.